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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

1968

NO. 1139

GULF STEVEDORE CORPORATION, ET AL,
Petitioners

v.

BERTRAM A. WATSON AND
R. J. SHEA, DEPUTY COMMISSIONER,
Respondents

BRIEF FOR THE RESPONDENT BERTRAM A. WATSON IN OPPOSITION

W. JILES ROBERTS
Attorney for Respondent Watson
617 Americana Building
Houston, Texas 77002

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 400 F_2 649. The opinion overruling petition for rehearing is reported at 404 F_2 1059. The District Courts opinion not reported appears at 164T and the Deputy Commissioner's order appears at 145T.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1968, and petition for rehearing was denied on December 9, 1968. The petition for a writ of certiorari was filed on March 10, 1969. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). The statutes involved are 33 U.S.C. 908(a) (f)(1), 914(m), 5 U.S.C. 556, 559, and 706 set out in appendix.

QUESTION PRESENTED

Whether the Deputy Commissioner's order awarding Respondent Bertram Watson compensation for permanent total disability was supported by substantial evidence.

STATEMENT

Respondent Bertram Watson, longshoreman, sustained a crushing injury

February 6, 1957, to the left lower extremity, see statement Deputy Commissioner 6T., which by way of treatment involved numerous operative procedures, removal of tissue and cross leg graft from the right lower extremity with subsequent amputation of the left lower extremity below the knee; during the time extending from February 1957, until April of year of hearing (1966) he worked intermittently, see 11-12T. In April of 1966, he developed a "hole" in amputation (14T) and again underwent surgery; at time of hearing he was under treatment for right leg which cramps when he walks on it for any period of time and he has "dead feeling" below the knee, which prevents him from feeling injury to that part of right extremity (unamputated extremity); he was unable to wear a prosthesis on the left lower (amputated stump) extremity, see 14-15T. Prior to February 6, 1957, respondent had sustained other injuries from which he recovered, 16T, prior to the injury of February 6, 1957. He sustained a subsequent injury in August, 1965, not involving either leg below the knee, 16-17T. Prior to time he became unable to wear prosthesis on the amputated extremity, he was unable to stand or walk on the other extremity for more than thirty or forty minutes because of the unamputated leg cramping, 18T. Such work

as he performed during the disability has been only a part of the work called for by the job to which he was assigned and he has had special parking considerations, 18-21T. The Deputy Commissioner observed the condition of the extremities, 22-23T, and was able to in camera compare his visual observation of the extremities with the pictures in evidence, Watsons exhibits 1 through 6, 10T; the shape of the right extremity, as shown by the pictures and visually observed by the Deputy Commissioner, was obviously deformed by reason of the cross leg graft; this deformity obviously supported his complaints of problems associated with use of the extremity. Watson had not really been able to work since the injury in question because of the condition of both legs below the knees and knew of nothing he could do which would enable him to get a job and earn money; he had an eight grade education, 101-106T. He has been paid, as a result of the disability at issue, in excess of $17,280.00 compensation, the maximum under the statute in effect, 33 U.S.C. 914(m) 3a supra, at time of injury unless he is entitled to compensation for permanent and total disability. The Deputy Commissioner found Respondent Watson permanently and totally disabled and ordered petitioners to pay compensation for such disability under the order until his death or the further order of the

Deputy Commissioner, 145-151T. Petitioners appealed, 153-158T, alleging the order of the Deputy Commissioner not to be in accordance with law in that Respondent Watson was not and could not be found on the basis of the record totally and permanently disabled, --- that the award was in error in law and in fact and that the findings were improper and wholly inequitable when viewed under the substantial evidence rule of the Administrative Procedures Act. The District Court, 164-168T, found that there was ample support in the evidence of the finding of the Deputy Commissioner that neither of the other injuries (1953 and 1965) contributed to Respondent Watson's present disability, that he was totally disabled from conditions attributable to this injury, but that the physicians testifying (employed by Petitioners) expected to effect a cure of his condition even though they had been unable in a period of nine (9) years then - twelve (12) now - to effect a recovery of Respondent to such a medical curative condition as to enable him to return to a job which he could perform. (He had not been able to perform the duties of the jobs held intermittently.) The District Court adopted the hopeful view of the employers physicians and held "---in the great majority of these cases remedies and cures are found," 167T, notwithstanding approximately

nine (9) years (now twelve) had elapsed since injury and Respondent admittedly was unable to work because of the injury and it was undisputed that such intermittent work as he had performed was performed with him receiving favored treatment at the hands of his employers and associates, 167-168T. The District Court enjoined the award and Respondent Watson appealed. The Circuit Court of Appeals reversed the District Court holding that the award of the Deputy Commissioner finding Watson to be permanently and totally disabled was supported by substantial evidence on the record as a whole and refused petition for rehearing En Banc, specifically finding that the record considered as a whole supported the order under the substantial evidence rule. Petitioners filed this petition, but prior to filing and subsequent to the ruling of the Circuit Court of Appeals decision, Respondent Watson sustained a fracture of the amputated extremity by reason of his crutch slipping, the use of which was made necessary by the injury in question and its consequences, see statement in re-withholding mandate filed with Circuit Court of Appeals.

ARGUMENT

33 U.S.C. 908 (a), see 1a, provides, insofar as this case is concerned, that "permanent and total disability shall be

determined in accordance with the facts." The Deputy Commissioner determined that Respondent Watson's disability was permanent and total. Had he had an amputation of both feet (extremity below the knee) the disability would of necessity been permanent and total in the absence of conclusive evidence to the contrary. See 33 U.S.C. 908(a) supra. In this case Respondent Watson has had an amputation of one foot and a material loss of use of the extremity below the knee necessitated by the removal of tissue in an attempt to prevent the amputation of the amputated extremity. He is unable to stand or walk for material periods of time on the unamputated extremity, assuming he could wear a prosthesis in lieu of the amputated extremity which he cannot. The Fifth Circuit Court of Appeals in Cunnygham vs. Donnavan, 328 F_2 694 in a somewhat similar case both as to education, training, and disability reversed the Deputy Commissioners denial of total permanent disability benefits under the Longshoremen's Act and ordered the payment of compensation where the longshoreman had an amputation of one foot and a 35% loss of use of the other leg. In this case the Deputy Commissioner did not find a percentage loss of use of the unamputated extremity but found facts which demonstrate the disability to be at least this much. There is no dispute in the evidence that even the

work performed by the Respondent Watson during the intermittent period that he was employed was of a very limited nature. The First Circuit Court of Appeals in Eastern Steamship Lines, Inc. vs. Monahan 110 F_2 840 allowed the injured longshoreman to recover total disability for an unhealed ulcer of the heel notwithstanding the ability to do work of a very limited nature.

Clearly a period of nine (9) years following injury (now twelve) with Respondent being unable to wear a prosthesis on his amputated extremity, with him having more problems than most amputees have, with tissue being removed from the unamputated extremity to such an extent that it was visually deformed as well as requiring medical treatment nine (9) years after the original injury, with the unamputated extremity preventing substantial walking or standing, with it having a dead feeling and being subject to injury without pain sensitivity to warn the employee of injury constituted substantial evidence that the Respondent was permanently disabled and was totally disabled. The most that could be said in favor of Petitioner in its attack on the order was that the physicians optimistic hope of ultimate recovery might possibly prove true and their prediction would ripen into a showing that the Deputy Commissioner

was wrong in his adjudication of the total disability being permanent. As the Circuit Court of Appeals in its opinion held in this case and as it likewise held in Godfrey vs. Henderson, 222 F_2 849, that in such an event (unlikely as it is considering the time involved) Petitioner had a remedy under 33 U.S.C. 922 to secure a new hearing by making application for same before the Deputy Commissioner to establish either a change of condition or mistake of fact. Since Respondent Watson has an injury, clearly not confined to one specific extremity in view of the operative procedures, for which he has been paid more than the $17,280 compensation provided for in 33 U.S.C. 914 (m), see 3a, in effect at the time of his injury, while Petitioners physicians remain optimistic, Petitioners have asked the Deputy Commissioner and are now asking the courts to deprive Respondent Watson of compensation on the basis of the optimistic hope of its physicians. No one can quarrel with the hopeful outlook on the part of the medical profession but to deny compensation as Petitioners would do, in view of the long record here, does not face the actual realities of the situation and it appears that obviously the order of the Deputy Commissioner was clearly right in ordering compensation paid when the entire record is considered in view of the substantial evidence rule,

especially in view of the subsequent injury brought about by the injury of February 6, 1957. (The matter of determination of fact as to causal relationship between the injury of February 5, 1957, and that of 1969 must be decided by the Deputy Commissioner but he is limited to some extent by the circumstance of this petition being prosecuted.)

Petitioner seems to be claiming that the injuries of 1953 and 1965 should give it some relief; however, it was clearly demonstrated at the hearing, and found by the Deputy Commissioner and upheld as being supported by substantial evidence that such injury was not causally related to his disability. In addition, as to the 1965 injury, 33 U.S.C. 908(f)(1), see 1a, would exclude such injury, since it refers only to prior injuries and not subsequent injuries.

This court held in Universal Camera Corp. vs. National Labor Relations Board 340 U. S. 71 71 Supreme Court 456, that some if not most of the Circuit Courts of Appeals were prior to the passage of the Administrative Procedures Act requiring the same standard as is required by the Administrative Procedures Act. Under this courts decisions as is pointed out in the Circuit Court of Appeals decision

below the Deputy Commissioners order was supported by substantial evidence. A clear reading of the Court of Appeals decision and the cases cited by Petitioner clearly reveals there is no conflict between the Court of Appeals in this case and other cases decided by it, nor is there any conflict between it and this court.

Petitioner would attack the Deputy Commissioner on the basis of bias and prejudice yet, nevertheless not only have they failed to demonstrate such bias or prejudice but Petitioner did not comply with 33 U.S.C. 556(b), see 6a, if it thought that there was bias or prejudice by filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of the Deputy Commissioner. Having failed to file the affidavit provided and comply with the statute it is estopped to make any complaint about the conduct of the Deputy Commissioner, if in fact there was any basis for it to begin with, which is denied. The Deputy Commissioner must be allowed some latitude in the handling of a hearing just as every judicial officer must be allowed some latitude.

The Petitioner has not made the showing necessary to justify the granting of the Petition for Writ of Certiorari and therefore the petition

should be denied. Wherefore, premises considered, Respondent prays that the petition be denied.

Respectfully submitted,

((ORIGINAL SIGNED) W. JILES ROBERTS

W. JILES ROBERTS
617 Americana Building
Houston, Texas 77002
223-4601

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondent Bertram A. Watson In Opposition to the petition have been served upon each of the following: Solicitor General, Department of Justice, Washington, D. C., 20530, Solicitor of Labor, Washington, D. C., 20530, each by depositing two (2) copies in a United States Post Office or mailbox addressed to their Post Office address, Airmail, postage prepaid, and upon Mr. Morton Sussman, United States Attorney, 515 Rusk Avenue, Houston, Texas 77002, counsel for Respondent, R. J. Shea, Deputy Commissioner; Mr. Carl O. Bue, Jr., Royston, Rayzor & Cook, 877 San Jacinto Building, Houston, Texas 77002, counsel for Petitioners Texas Employers' Insurance Association and Gulf Stevedore Corporation, by depositing in a United States Post Office or mailbox the same to each of them, Airmail, United States Mail, postage prepaid, properly addressed to each of them at their respective Post Office addresses, this the 3rd day of April, 1969.

(ORIGINAL SIGNED) W. JILES ROBERTS

W. JILES ROBERTS

33 U.S.C. 908. Compensation for disability

Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(f) Injury increasing disability: (1) If an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: Provided, however, That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation

that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 944 of this title.

33 U.S.C. 914. Payment of compensation

(m) The total money allowance payable to an employee as compensation for an injury under this chapter shall in no event exceed in the aggregate the sum of $17,280: Provided, That this limitation shall not apply to cases of permanent total disability or death: And provided further, That in applying this limitation there shall not be taken into account any amount payable under section 908(g) of this title for maintenance during rehabilitation or any amount of additional compensation required to be paid under this section for delay or default in the payment of compensation collectible under section 918 of this title. Mar. 4, 1927, c. 509, 14,44 Stat. 1432; May 26, 1934, c. 354, 4, 48 Stat. 807; June 25, 1938, c. 685, 7, 52 Stat. 1167; 1946 Reorg.Plan No. 2, 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; June 24, 1948, c. 623, 5, 62 Stat. 603; 1950 Reorg.Plan No. 19, 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271; July 26, 1956, c. 735, 5, 70 Stat. 655.

33 U.S.C. 922. Modification of awards

Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in the determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. Mar. 4, 1927, c. 509, 22, 44 Stat. 1437; May 26, 1934, c. 354,

5, 48 Stat. 807; June 25, 1938, c. 685, 10, 52 Stat. 1167; 1946 Reorg. Plan No. 2, 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1950 Reorg. Plan No. 19, 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271.

5 U.S.C. 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence —

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a

timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part ofthe record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may —

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplication of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this

title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part oft he evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding,

constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 U.S.C. 559. Effect on other laws; effect of subsequent statute

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2) (E), 5362, and 7521, and the provisions of section 5335(a)(B) of this title that relate to hearing examiners, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2) (E), 5362, or 7521, or the provisions of section 5335(a) (B) of this title that relate to hearing examiners, except to the extent that it does so expressly.

5 U.S.C. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conculsions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of

an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.